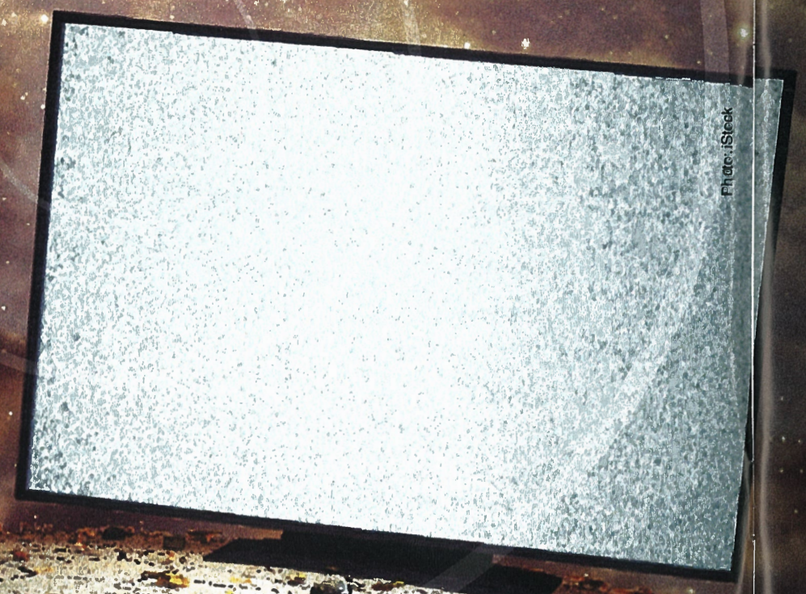
Aereo Post-Mortem

Was It Ever Really About the Cloud?

By Craig B. Whitney



In early 2014, the technology industry and copyright community waited with great anticipation for the U.S. Supreme Court's copyright infringement decision in *American Broadcasting Cos. v. Aereo, Inc.*[1] Looming over the outcome was the question of whether a decision against Aereo's cloud-based broadcast television streaming service would signal, at a minimum, a landscape change for cloud-based technology. Or if a ruling that Aereo's service did *not* infringe would open the floodgates for others to make copyrighted content publicly available over the cloud without recourse to the copyright owner.

In the end, these apocalyptic fears may have been misplaced—at least for now. The Supreme Court ruled in June 2014 that Aereo's service constituted an unauthorized public performance in violation of the U.S. Copyright Act. The Court largely disregarded the cloud-based nature of Aereo's service, and instead likened the service to that of a traditional cable company, which Congress has long recognized as requiring a license to retransmit broadcast television programming to avoid violating the public performance right. In an attempt to limit the reach of its decision, the Court even went so far as to identify specific technology and types of services to which the decision was not intended to apply.

Following the Court's decision—and Aereo's subsequent failed attempt to be treated as a cable company for the purpose of a statutory license—Aereo filed for bankruptcy. But the lingering question is the effect of the Court's decision on other technology, notwithstanding the Court's attempts to keep the cloud away from its holding. For now, however, the technology community can seemingly breathe a sigh of relief that innovation has not been stifled. And copyright holders can take comfort that technological innovation will not necessarily be a means to circumvent well-settled—albeit outdated—copyright law.

The *Aereo* Litigation

Aereo's service allowed subscribers to watch over-the-air broadcast television programming on their Internet-connected devices either live (subject to a brief time delay) or recorded for later viewing (provided the subscriber chose to record the program prior to its airing).[2] Here's how it worked: a subscriber would select a broadcast television program from a list on Aereo's website or mobile app; one of Aereo's cloud servers would tune one of thousands of "dime-sized antennas"—no two subscribers shared the same antenna at the same time—to that over-the-air broadcast; Aereo would transcode the signals from that broadcast into a form that could be transmitted over the Internet; the cloud server would save the program in a folder dedicated to that subscriber—each subscriber received a unique copy of any given program; and, if the subscriber wished to watch the program "live," Aereo's cloud server would stream the program to the subscriber over the Internet (after several seconds of programming had been saved).[3] The subscriber could also choose to view the program at a later time.[4]

In 2012, various broadcasters sued Aereo in the Southern District of New York for direct and secondary copyright infringement.[5] The broadcasters moved for a preliminary injunction to enjoin Aereo's "live" streaming of the broadcasters' programming.[6] The broadcasters alleged that Aereo's "live" streaming constituted an unauthorized public performance of copyrighted television programming and caused the broadcasters irreparable harm.[7] Aereo, on the other hand, claimed it only provided the equipment to do what individuals could legally do in their homes—i.e., watch broadcast television using an antenna.[8]

The public performance right, as codified in the 1976 Copyright Act, grants copyright holders, among other things, the exclusive right to transmit a copyrighted performance to the public, whether or not those members of the public receive it in the same location and at the same time.[9] This provision, commonly referred to as the Transmit Clause, was added to the Copyright Act by Congress in part to overturn prior Supreme Court decisions holding that cable companies do not infringe the public performance right in the copyrights to broadcast television content when they retransmit that content.[10] Congress clarified that a cable company that retransmits a broadcast television program indeed performs "publicly."[11]

The Southern District of New York nevertheless denied the broadcasters' preliminary injunction request against Aereo, finding that, based on the Second Circuit's decision in *Cartoon Network LP v. CSC Holdings, Inc.* (*Cablevision*),[12] Aereo's transmissions were unlikely to constitute public performances.[13] In *Cablevision*, the technology at issue was a remote-storage DVR system, where a subscriber could authorize Cablevision to record a television program on a Cablevision-hosted server, rather than on the subscriber's set-top box in the subscriber's home.[14] The relevant issue was whether Cablevision publicly performed the copyrighted program when a subscriber watched the recording because Cablevision was making and storing the recording.[15] The Second Circuit found that the playback from Cablevision's remote-storage DVR system was not a performance "to the public" because each recording and subsequent transmission was unique to an individual subscriber and only the subscriber who authorized the recording could play it back.[16] Aereo had stated that its technology was designed to be non-infringing based on this existing law.[17]

The broadcasters appealed the district court's denial of their preliminary injunction motion to the Second Circuit, which affirmed the ruling in a split decision.[18] The court ruled that, like the defendant's system in *Cablevision*, the
scriber decided which program to view, Aereo's system made
unique recording of that program, and that unique copy was sent only to the subscriber who authorized it.[19] This architecture, according to the Second Circuit, did not violate the precise wording of the Transmit Clause.[20] Judge Chin, in a dissenting opinion, disagreed with the majority's view. He felt that Aereo's service was designed to take advantage of a perceived loophole in the law and that its mini-antennae setup was a "Rube Goldberg-like contrivance."[21]

The case was argued before the Supreme Court on April 22, 2014.[22] A recurring theme during the oral argument was the impact that the Court's decision would have on other technologies and industries.[23] Justice Breyer, for example, plainly stated: "And then what disturbs me on the other side

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is I don't understand what a decision for [Aereo] or against [Aereo] when I write it is going to do to all kinds of other technologies."[24] Justice Alito echoed this sentiment: "I need to know how far the rationale that you want us to accept will go, and I need to understand, I think, what effect it will have on these other technologies."[25] The justices' concerns mainly focused on cloud technology generally, although certain specific companies and technologies were identified by name, including Netflix, Hulu, and Roku.[26]

The Court's June 25, 2014, majority opinion, authored by Justice Breyer, addressed two questions regarding the public performance right: (1) does Aereo "perform" a copyrighted work; and (2) if so, is that performance "public"?[27] According to the Court's 6–3 decision, the answer to both questions is yes.

The Copyright Act defines "perform" as "to show [the audiovisual work's] images in any sequence or to make the sounds accompanying it audible."[28] Under this definition, "*both* the broadcaster *and* the viewer of a television program 'perform.'"[29] The Court disagreed with Aereo's argument that it was simply a supplier of equipment that allows users to perform content and that it did not itself perform such content. Instead, the Court determined that Aereo was essentially no different in substance than a traditional cable company, to which Congress expressly intended to have the public performance right apply.[30] The technological difference between Aereo and traditional cable systems at issue when the Copyright Act was amended—that the latter systems transmitted content constantly while Aereo's system remained inert until subscribers indicated that they wanted to watch a program—was insignificant to the Court.

Given Aereo's overwhelming likeness to the cable companies targeted by the 1976 amendments, this sole technological difference between Aereo and traditional cable companies does not make a critical difference here. . . . [T]he many similarities between Aereo and cable companies, considered in light of Congress' basic purposes in amending the Copyright Act, convince us that this difference is not critical here. We conclude that Aereo is not just an equipment supplier and that Aereo "perform[s]."[31]

After concluding that Aereo performed a copyrighted work, the Court then determined that Aereo transmitted its performance of the copyrighted works to the public.[32] An entity "transmits" a performance if it "communicate[s] by any device or process whereby images or sounds are received beyond the place from which they are sent."[33] Because Aereo's service satisfied this definition, and because the Transmit Clause contemplates that an entity can transmit a performance "through one or several transmissions, where the performance is of the same work," the Court concluded that "when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes."[34]

The fact that the Aereo service involved individual recordings for each subscriber that played each recording only to its designated subscriber was, according to the Court, just the "behind-the-scenes way in which Aereo delivers television programming to its viewers' screens" but "do[es] not render Aereo's commercial objectives any different from that of cable companies" or "significantly alter the viewing experience of Aereo's subscribers."[35]

The Court again explained that Aereo was conceptually no different from a cable company. "In terms of the Act's purposes, these differences do not distinguish Aereo's system from cable systems, which do perform 'publicly.' Viewed in terms of Congress' regulatory objectives, why should any of these technological differences matter?"[36]

The Court ultimately held: "Insofar as there are differences, those differences concern not the nature of the service that Aereo provides so much as the technological manner in which it provides the service. We conclude that those differences are not adequate to place Aereo's activities outside the scope of the Act."[37]

In reaching its conclusion, the Court did not address *Cablevision* at all, leaving *Cablevision* as good law but leaving open the question as to how it should apply to similar technology going forward.

Following the decision, Aereo tried to seize on the Court's cable company comparison by applying for a statutory license under § 111 of the Copyright Act. Cable companies are entitled to such a license at statutory rates for their secondary transmissions of broadcast television programming.[38] Both the U.S. Copyright Office and the district court, however, denied Aereo's attempt to obtain a § 111 license.[39] The Second Circuit had previously addressed the issue of whether "a service that streams copyrighted television programming live and over the Internet, constitutes a cable system under § 111 of the Copyright Act" in *WPIX, Inc. v. ivi, Inc.*, where the court decided that Congress "did not intend for § 111's compulsory license to extend to Internet retransmissions."[40] The district court, in denying Aereo's request, stated:

> [T]he Supreme Court . . . did not imply, much less hold, that simply because an entity performs publicly in much the same way as a CATV system, it is necessarily a cable system entitled to a § 111 compulsory license. . . . Stated simply, while all cable systems may perform publicly, not all entities that perform publicly are necessarily cable systems, and nothing in the Supreme Court's opinion indicates otherwise.[41]

The district court granted the broadcasters' preliminary injunction motion barring Aereo from retransmitting programs to its subscribers while the programs were still being broadcast.[42]

A few weeks later, Aereo filed for bankruptcy.[43]

The Cloud after *Aereo*

Aereo's fate is clear, but what about the Court's and the public's concern about the greater impact of a decision against Aereo on other technology? For its part, the Court took the unusual step of proactively addressing some of these concerns in the decision itself. The Court specifically stated that it did not believe its "limited holding" would "discourage" or "control the emergence or use of different kinds of technologies."[44] Indeed, the Court's consistent analogy to a traditional cable company made clear that the Court was not focusing on the *means* by which Aereo transmitted content to its subscribers—e.g., the cloud—but rather the fact that Aereo was transmitting copyrighted content that Congress had already deemed infringing. The Court even laid out areas that its decision did not reach, including "whether different kinds of providers in different contexts also 'perform'" and "whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content."[45] In fact, the Court ultimately noted that, to the extent that commercial actors were still concerned about the legality of certain developing technologies, "they are of course free to seek action from Congress."[46]

The Court actually went a step further and seemingly gave an affirmative nod to the validity of cloud locker services (at least where users are storing authorized copies of works in their lockers), ruling that "an entity that transmits a performance to individuals in their capacities as owners or possessors does *not* perform to 'the public.'"[47] Moreover, the Court reiterated that "an entity does not transmit to the public if it does not transmit to a substantial number of people outside of a family and its social circle."[48]

It seems, therefore, that cloud technology was largely unaffected—positively or negatively—by the *Aereo* decision. At least as far as the decision is concerned, we can likely assume that cloud technology, in and of itself, neither creates nor insulates a provider from copyright infringement liability. But regardless of the Court's attempt to avoid its decision bleeding into other technologies, any evaluation of whether the transmission of content—whether by new or existing technology—violates the public performance right will have to be viewed under the language of the *Aereo* decision. For example, while the Second Circuit's *Cablevision* decision was not expressly overruled or even examined in the *Aereo* decision, any future determination as to whether remote-storage DVR technology violates the public performance right would likely first be analyzed under *Aereo*—not *Cablevision*—at least outside of the Second Circuit. And, within the Second Circuit, one envisions a lively, ongoing debate as to what extent *Cablevision* dealt with transmissions to individuals in their capacities as owners or possessors of the products at issue, which, as noted above, the Supreme Court viewed as a situation left unaffected by its *Aereo* ruling.

The *Aereo* decision confirmed that using the cloud to mimic traditional cable services without authorization is taboo, and it appears that cloud locker storage—at least of rightfully possessed content—is safe, but what about the many areas outside of these contexts? What if the cloud locker is storing pirated videos? Or if a company is distributing authorized content, but in doing so is making unauthorized reproductions? Is that copyright infringement? Attorneys and courts may have difficulty finding the answers to these questions in *Aereo*.

It is clear, however, that we have not heard the last of *Aereo*, at least the ruling, if not the company. Indeed, other cases have already attempted to apply the *Aereo* decision to other technology. In the long-running dispute in *Fox Broadcasting Co. v. Dish Network, L.L.C.*, for example, Fox claimed (among other things) that certain Dish services that allow Dish subscribers to view live and recorded shows on Internet-enabled devices violate the public performance right. Both parties argued in their summary judgment motions that *Aereo* supported their respective positions.[49]

The district court's decision, however, focused on a legal principle of copyright law that *Aereo* did not: volitional conduct. This notion requires that a direct infringer commit the infringing act, such as pressing the "copy" button or initiating the download, and has received significant attention in the appellate courts, but very little from the Supreme Court. Justice Scalia's dissenting opinion in *Aereo*, in fact, criticized the majority for its apparent failure to address whether Aereo had the requisite volitional conduct for direct infringement (which the dissent felt it did not).[50] But the district court in *Fox v. Dish Network* held that Dish lacked the requisite volitional conduct for direct infringement of the public performance right, which it stated was consistent with *Aereo*. According to the district court: "The *Aereo* Court distinguishes between an entity that 'engages in activities like Aereo's' and one that 'merely supplies equipment that allows others to do so.' The Court held that a sufficient likeness to a cable company amounts to a presumption of direct performance, but the distinction between active and passive participation remains a central part of the analysis of an alleged infringement."[51]

The district court—adhering to the Supreme Court's warning that *Aereo* was a "limited holding"—found that Dish's service did not bear an "overwhelming likeness" to a traditional cable company the way Aereo's service did, and therefore the *Aereo* decision did not support a finding of direct infringement for violating the public performance right.[52] The court also held that Dish's subscribers did not perform "publicly"—and therefore Dish could not be secondarily liable—in part because, unlike Aereo's subscribers, Dish's subscribers had the right to possess the content initially as a result of Dish's license with Fox.[53]

Although this was only an isolated district court decision, to the extent it is indicative of how courts will interpret the public performance right following *Aereo*, future technology may need to closely resemble a traditional cable system to fall within the scope of the *Aereo* decision. ■

Endnotes

1. 134 S. Ct. 2498 (2014).
2. *Id.* at 2503.
3. *Id.*
4. *Id.*
5. Complaint, Am. Broad. Cos. v. Aereo, Inc., No. 12-cv-1540 (S.D.N.Y. Mar. 1, 2012), ECF No. 1; Complaint, WNET, Thirteen v. Aereo, Inc., No. 12-cv-1543 (S.D.N.Y. Mar. 1, 2012), ECF No. 1.
6. *See* Am. Broad. Cos. v. Aereo, Inc., 874 F. Supp. 2d 373, 376 (S.D.N.Y. 2012), *aff'd sub nom.*, WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013), *cert. granted*, Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 896, *and rev'd and remanded*, 134 S. Ct. 2498 (2014).
7. *Aereo*, 134 S. Ct. at 2504.
8. *Id.* at 2503.
9. 17 U.S.C. §§ 101, 106(4).
10. *See* Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394, 414–15 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 401 (1968).

11. 17 U.S.C. § 101.

12. 536 F.3d 121 (2d Cir. 2008).

13. *See* Am. Broad. Cos. v. Aereo, Inc., 874 F. Supp. 2d 373, 385–86 (S.D.N.Y. 2012).

14. *Cablevision*, 536 F.3d at 123–24.

15. *Id.* at 134.

16. *Id.* at 134–35.

17. *See, e.g.*, Jordan Crook, *Aereo Founder Chet Kanojia on Expansion, New Content Deals, and Operating within the Law*, TECHCRUNCH (Dec. 15, 2012), http://techcrunch.com/2012/12/15/aereo-founder-chet-kanojia-on-expansion-new-content-deals-and-operating-within-the-law/.

18. WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013), *cert. granted sub nom.*, Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S. Ct. 896, *and rev'd and remanded*, 134 S. Ct. 2498 (2014).

19. *Id.* at 689–93.

20. *Id.* at 694.

21. *Id.* at 697 (Chin, J., dissenting).

22. Transcript of Oral Argument, Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498 (2014) (No. 13-461), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-461_o7jp.pdf.

23. *See id.*

24. *Id.* at 38:13–16.

25. *Id.* at 15:14–17.

26. *Id.* at 12:5–9; 47:14–18.

27. *Aereo*, 134 S. Ct. at 2504.

28. 17 U.S.C. § 101.

29. *Aereo*, 134 S. Ct. at 2505–06.

30. *Id.* at 2501.

31. *Id.* at 2507 (alteration in original).

32. *Id.* at 2510.

33. 17 U.S.C. § 101.

34. *Aereo*, 134 S. Ct. at 2509.

35. *Id.* at 2508.

36. *Id.*

37. *Id.* at 2511.

38. 17 U.S.C. § 111(c), (d).

39. Opinion and Order, Am. Broad. Cos. v. Aereo, Inc., No. 12-cv-1540 (S.D.N.Y. Oct. 23, 2014), ECF No. 341; Letter from Jacqueline C. Charlesworth, Gen. Counsel & Assoc. Registrar of Copyrights, U.S. Copyright Office, to Matthew Calabro, Aereo, Inc. (July 16, 2014), *available at* http://www.nab.org/documents/newsRoom/pdfs/071614_Aereo_Copyright_Office_letter.pdf.

40. 691 F.3d 275, 279, 282 (2d Cir. 2012).

41. Opinion and Order, *supra* note 39, at 6.

42. *Id.* at 16.

43. Voluntary Petition, *In re* Aereo, Inc., No. 14-13200 (Bankr. S.D.N.Y. Nov. 20, 2014), ECF No. 1.

44. Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498, 2510 (2014).

45. *Id.* at 2510–11.

46. *Id.* at 2511.

47. *Id.* at 2510 (emphasis added).

48. *Id.* at 2511.

49. Dish Memorandum in Support of Motion for Summary Judgment, Fox Broad. Co. v. Dish Network, L.C.C., No. 12-cv-4529 (C.D. Cal. Aug. 22, 2014), ECF No. 373; Fox Memorandum in Support of Motion for Partial Summary Judgment, Fox Broad. Co. v. Dish Network, L.C.C., No. 12-cv-4529 (C.D. Cal. Aug. 22, 2014), ECF No. 390.

50. *Aereo*, 134 S. Ct. at 2512–14 (Scalia, J., dissenting).

51. Order re: Plaintiff Fox Broadcasting Company's Motion for Partial Summary Judgment and Defendant Dish Network LLC's Motion for Summary Judgment at 22, Fox Broad. Co. v. Dish Network, LCC, No. 12-cv-4529 (C.D. Cal. Jan. 12, 2015), ECF No. 607 (citation omitted) (citing *Aereo*, 134 S. Ct. at 2504).

52. *Id.* at 21, 24.

53. *Id.* at 26.